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IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

SBC COMMUNICATIONS INC., *et al.*,
Petitioners,
v.
FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

The government's defense of the "Special Provisions Concerning Bell Operating Companies" rests not on the Fifth Circuit's analysis—which the government notably fails to endorse—but on the following proposition: those provisions are "no more 'punitive' in character than the many other statutes that exclude certain corporations from particular lines of business to protect competition or promote other economic goals." Govt. Opp. 11. The "very abundance" of these "line-of-business restrictions" allegedly rebuts our argument "that there [is] something inherently or historically 'punitive' " about them. *Id.* at 12. Crucially, however, the line-of-business restrictions cited by the government are all *general* prohibitions that regulate an open, neutrally defined class, for instance by restricting national banks from underwriting securities. *Id.* at 11 n.7.

The Special Provisions are different from such statutes —different in a constitutionally decisive respect. The Special Provisions prevent a closed class of 20 named companies from entering otherwise lawful businesses. It is one thing for Congress to make a generalized judgment that competition will be promoted if certain restrictions are imposed on a neutrally defined class; it is quite another for Congress to legislate no rule at all, but simply to decree that a handful of named parties cannot engage in those activities. There is no legitimate reason for Congress to act by singling out a few disfavored entities by name for such punishment.

That is why, as our petition explained (with no response from the government), a law preventing Citibank alone and by name from engaging in investment banking, or specifying that Microsoft may not sell Internet browsers, would be unconstitutional even if a general law imposing the same disability on a class of banks or software makers would not. The Special Provisions are no different than such hypothetical, plainly unconstitutional statutes, and

they represent an extraordinarily illegitimate—and dangerous—form of lawmaking.

Tellingly, moreover, neither the government nor the long-distance incumbents can find *any* prior instance where Congress passed a law that prevents named companies from engaging in lawful lines of business. Congress's "prolonged reticence" in this regard would be "amazing if such [action] were not understood to be constitutionally proscribed." [1] It is that "prolonged reticence," not any judicial approval of such extraordinary legislative judgments against specific named entities, that explains why there is "*no* case" (Govt. Opp. 12) determining that such restrictions are invalid.

If, contrary to two centuries of practice, Congress *were* free to make individualized—that is, judicial—judgments about which persons, groups, or companies are likely to follow the law and which likely will not and thus must be subjected to special disabilities, the Bill of Attainder Clause woud be utterly devoid of meaning. It would not serve as "a general safeguard against legislative exercise of the judicial function or more simply—trial by legislature." [2] It would be little more than a museum piece.[3]

Thus, as in *City of Boerne v. Flores*, 117 S. Ct. 2157 (1997), certiorari is warranted here even in the absence of a circuit split so that the Court may address the question of whether a *species* of statute that undermines basic separation of powers principles is outside the scope of

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[1] *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 230 (1995).

[2] *United States v. Brown*, 381 U.S. 437, 442 (1965).

[3] Indeed, it is the very starkness of that result that leads both the government and its private supporters to run head-long away from the Fifth Circuit's analysis. As our petition explained, the circuit court's decision essentially decreed that this Court's leading precedents on the Attainder Clause are dead, and that other decisions of this Court on that Clause are too confusing to have serious precedential value. The Fifth Circuit's complete emasculation of that Clause thus stands as an independent danger calling for action by this Court.

Congress's power. Indeed, the D.C. Circuit has just decided the lone remaining case raising the Attainder Clause issue under the 1996 Act (*BellSouth Corp. v. FCC*, No. 98-1019 (D.C. Cir. Dec. 22, 1998)), thus removing any likelihood of further development on this issue in the courts of appeals.[4]

The case for certiorari is also unusually strong because all parties agree that the foundational constitutional issues posed here arise in the context of "an unusually important legislative enactment." *Reno v. ACLU*, 117 S. Ct. 2329, 2337 (1997). Neither the government nor the long-distance incumbents can dispute that this case implicates enormously significant practical issues—issues that are central to the development of the communications networks that touch the lives of every American. Accordingly, it should come as no surprise that twelve States that have taken various positions on the merits have nevertheless urged the Court to grant review so that it may expeditiously "resolve definitively a matter of great importance." Brief of the State of Arizona, *et al.*, as *Amici Curiae* at 1. *See also Amicus Curiae* Brief of the State of Texas at 2-3.

THE COURT SHOULD GRANT CERTIORARI TO ADDRESS THE FUNDAMENTAL CONSTITUTIONAL ISSUES POSED BY THIS CASE.

1. The government supplements the primary argument we addressed at the outset—that the Special Provisions are no different from ordinary line-of-business restrictions—with a series of related contentions intended to demonstrate that the Special Provisions are something other than an attempt to punish a few handpicked companies. None is persuasive.

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[4] The D.C. Circuit's decision, which was limited to the constitutionality of 47 U.S.C. § 271, largely followed the analysis of its earlier decision dealing with 47 U.S.C. § 274, and is mistaken for the reasons given in our petition (at 21-22 & n.10). Significantly, all appeals from FCC decisions under section 271 must go to the D.C. Circuit (47 U.S.C. § 402(b)(9)).

First, the government, while acknowledging that the specificity prong of the Attainder Clause test is met here,[5] argues that we "conflate" the issues of specificity and punishment, "as though specificity alone could convert a non-punitive statute into a bill of attainder." Govt. Opp. 14. That contention misstates our argument—and this Court's case law. We do not collapse these two distinct inquiries; rather, our analysis, unlike the government's, recognizes the undeniable fact—a fact crucial to Attainder Clause jurisprudence generally—that the *same prohibition that is constitutionally unobjectionable when applied to a generalized class may in fact constitute punishment when applied to specific individuals.* For instance, while Congress plainly does not impose punishment when it determines that a generally defined group of employees (say, those with less than three years of service) should be laid off, it does inflict punishment when the same disability is imposed on three named individuals. *See United States v. Lovett*, 328 U.S. 303, 316 (1946).

Such person-specific punishment is impermissible *even if*—as the government struggles mightily, but irrelevantly, to demonstrate (Govt. Opp. 9-10, 17-20)—one could later identify a rational basis for selecting only those particular persons for abuse. *See Brown*, 381 U.S. at 449 n.23 ("We think it clear from the Lovett opinion that [the challenged statute] would have been voided even if it could have been demonstrated that no one other than Lovett,

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[5] The long-distance incumbents suggest perversely that the Special Provisions are not person-specific because they apply not only to the 20 named companies, but also to their "successors and assigns." MCI Opp. 17 (citing 47 U.S.C. § 153(4)(B)); *see also* Govt. Opp. 13. In fact, that argument simply underscores the reality that the Special Provisions apply only to a closed class. No one can ever leave, and no one can ever join—no matter how much things change in the future. No matter how large a share of local telephone markets AT&T might gain as a result of its proposed merger with cable telephony provider TCI, it is not subject to these restrictions. And no matter how large a part of local telephone markets any of the 20 BOCs might lose, their local exchange operations are still subject to the restrictions.

Watson and Dodd possessed the characteristics which Congress was trying to reach."). The Bill of Attainder Clause categorically prohibits trial by legislature, even if Congress reaches an arguably "correct" verdict. As Justice Holmes explained, "it is not within the province of a legislature to declare [someone] guilty or presumptively guilty of a crime." *McFarland v. American Sugar Ref. Co.*, 241 U.S. 79, 86 (1916).

Nor does this analysis ignore *Nixon v. Administrator of General Services*, 433 U.S. 425, 474 (1977). There, the Court rejected President Nixon's Attainder Clause argument because the challenged statute did not constitute punishment *even when imposed on a single person.* In particular, President Nixon was entitled to the full measure of "just compensation" for the congressionally ordered temporary retention of his papers and thus could hardly be said to suffer punishment. *See id.* at 475. By contrast, this Court's precedents teach that if Congress had specified that President Nixon could not practice law or hold public employment, that would constitute an attainder.

Indeed, *Nixon* itself states that laws that "bar[] designated individuals or groups from participation in specified employments" are flatly "*impermissible*" under the Attainder Clause. *Id.* at 474. The government seeks to skirt this aspect of *Nixon*—and the century of this Court's case law repeatedly finding that restrictions on entering specific employments are "punishment"—by proffering a distinction between such laws as applied to corporations and as applied to "flesh-and-blood members of vilified political groups." Govt. Opp. 12. *See id* at 9 (the Special Provisions are "unlike sanctions based on an individual's political affiliation"); MCI Opp. 22. But the Solicitor General notably does not suggest that corporations fall outside the protection of the Attainder Clause—a proposition that, in any event, is belied by *Plaut* (*see* 514 U.S. at 239 n.9) and that even the Fifth Circuit did not accept (Pet. App. 12a n.11). The only way to punish corporations is

through *economic* restrictions of just the kind imposed by the Special Provisions.

In the end, the government's contention boils down to a covert attempt to turn Attainder Clause jurisprudence into a warped and redundant variant of First Amendment freedom of association doctrine—a variant that protects only those groups that can demonstrate some degree of subjective "vilification." But the Attainder Clause is a *structural* limitation on the kinds of statutes that Congress may constitutionally enact, and it protects the liberty of *all* individuals and groups by imposing basic limits on the actions Congress may take. *See* 2 J. Story, *Commentaries on the Constitution of the United States* § 521, at 5 n.1 (1833) ("[T]he first maxim . . . of a free state is, that the laws be made by one set of men, and administered by another; in other words, that the legislative and judicial characters be kept separate.").

2. Although the long-distance incumbents are careful not to endorse the Fifth Circuit's unbounded and ill-defined "prophylactic exception" to the Attainder Clause, in the end they rely on an analysis that is nearly indistinguishable from the appellate court's, and that just as surely would gut that Clause. In particular, those companies claim that, outside of a self-defined class of what they term "inherently punitive" disabilities—such as the death penalty—even a restriction imposed on specific companies by name may be appropriate if it can be justified (after the fact) by a "reasonable nonpunitive explanation." MCI Opp. 25.

As our petition took great pains to explain, that is plainly incorrect. The suggestion that a law that targets a closed class of named entities for the imposition of punishment, as that term has historically been understood, may nevertheless survive Attainder Clause scrutiny if one can identify a forward-looking, prophylactic purpose, for that law clashes both with the Framers' understanding and with this Court's decisions. Moreover, it replaces a clear, historically grounded approach with an impressionistic, manipulable inquiry into legislative intent. And it does so

solely in an attempt to salvage a form of legislation (laws targeting a closed class of individuals or entities for disabilities) that serves no legitimate purpose—Congress may impose exactly the same restriction by identifying the characteristics that warrant concern on a forward-looking basis and then allowing the other Branches to apply those restrictions to particular entities, after granting them full due process protections. *See* Pet. 16-19.

In any event, the Court has repeatedly held that restrictions on pursuing lawful businesses fall within the historical checklist of impermissible punishments, thus making any further inquiry unnecessary. *See, e.g., Selective Serv. Sys. v. Minnesota Pub. Interest Research Group*, 468 U.S. 841, 852 (1984) ("the list of punishments *forbidden* by the Bill of Attainder Clause . . . include[s] legislative bars to participation by individuals or *groups* in specific employments or professions") (emphasis added); *Nixon*, 433 U.S. at 474 (stating that the same restrictions are "impermissible"). *Compare* MCI Opp. 21 (wrongly suggesting that *Nixon* merely "indicated" that such restrictions "might qualify" as punishment).[6] More generally, as our petition demonstrated (at 17), in case after case this Court has held that the kind of forward-looking purpose posited by MCI does not prevent a restriction from constituting punishment: "[L]egislative intent to encourage compliance with the law does not establish that a statute is merely the legitimate regulation of conduct." *Selective Serv.*, 468 U.S. at 851.

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[6] The long-distance incumbents cite the statement in *Selective Service* that a legislative purpose inquiry is "necessary" in all Attainder Clause cases. But the Court made plain that it was undertaking such additional inquiries only in order "[t]o ensure that the Legislature has not created an impermissible penalty not previously held to be within the proscription against bills of attainder" (468 U.S. at 853)—not to limit the historical scope of that clause. Similarly, far from supporting the incumbents' position here, *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 324 (1867), establishes that restrictions intended to affect future conduct (instead of obtaining retribution for past acts) were also attainders.

The long-distance incumbents cite cases such as *Hawker v. New York*, 170 U.S. 189 (1898), and *De Veau v. Braisted*, 363 U.S. 144 (1960), in favor of a contrary rule, but those decisions are manifestly inapposite. They involved generally applicable licensing or qualification rules, not rules targeted to a closed class of named parties. Moreover, even if they did stand for the proposition that the ability to hypothesize a forward-looking prophylactic intent for congressional action undermines an Attainder Clause claim, that would merely demonstrate that there is a significant conflict in the Court's case law that calls for resolution in this case. Indeed, as we explained in our petition (at 27-29), the Fifth Circuit itself repeatedly remarked on its uncertainty as to the Court's holdings on this important issue (as well as others)—an uncertainty that strongly argues for a grant of certiorari in this case.

3. Both the government and the long-distance incumbents ultimately seek refuge in arguments about the BOCs' status prior to the 1996 Act and their actions during consideration of the legislation that became the 1996 Act. These arguments are both legally irrelevant and unpersuasive even on their own terms.

The long-distance incumbents assert that the Special Provisions confer "enormous benefits" (MCI Opp. 18) on the BOCs. But, as our petition explained, it is impossible—and, in any event, singularly inappropriate—to judge whether particular private parties are likely to fare better before a specific federal court or a particular federal agency. Such speculation on imponderables can hardly provide the basis for upholding a wholly novel and illegitimate form of legislation.

In any event, we cannot fathom how a statute that *reimposes* restrictions (*see* 47 U.S.C. §§ 274, 275) that the MFJ court had previously *lifted*—and that creates a byzantine and, to date, completely futile process for seeking re-

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[7] Under section 271, the FCC is given veto power under broad statutory criteria even though the generic provisions of the 1996 Act (47 U.S.C. §§ 251-253) deprive each BOC of the state-protected

lief from other restrictions [7]—can be understood as a benefit. In fact, it is no such thing, notwithstanding MCI's self-serving statements to the contrary.

The long-distance incumbents similarly err in relying on the supposed fact that "the BOCs lobbied hard for the very provisions they now attack." MCI Opp. 1. As an initial matter, although this canard has been recycled repeatedly, this Court has made plain that it is legally irrelevant. The fact that "a party collaborated with others in seeking legislation has never been understood to estop the party from challenging that legislation in subsequent litigation." *New York v. United States*, 505 U.S. 144, 183 (1992).

In any event, the BOCs vigorously *opposed* enactment of special rules applicable to them alone. On no less than three occasions, the BOCs submitted testimony arguing that the Special Provisions would be unconstitutional. *See* Pet. 25-26 & n.13. And the Chairman of SBC Communications testified that singling out the BOCs and tying "our hands in the long-distance arena until there is pervasive competition in the local exchange market" would be "wrong, anti-competitive, counterproductive, and anti-consumer." *Communications Law Reform: Hearings Before the Subcomm. on Telecommunications and Finance of the House Comm.*

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local franchise monopoly that was the rationale for the AT&T Decree. By contrast, Section VIII(C) of the Decree provided that the BOCs could obtain long-distance relief even when they still retained "monopoly power," and even over the government's objection. In almost three years, the FCC has refused to grant any approval of long-distance authority under the new law. And even if it were ultimately to grant relief to a BOC in a particular State, section 271(d)(6) contains a permanent special disability permitting the FCC to withdraw long-distance authority at any time. The FCC has recently made clear that it plans, pursuant to its view of congressional intent, to preserve section 271 as a whip to compel compliance by the BOCs with other statuory and regulatory objectives. *See* Memorandum Opinion and Order, *AT&T Corp. v. Ameritech Corp.*, File Nos. E-98-41 *et al.*, FCC 98-242 ¶¶ 37, 39 (rel. Oct. 7, 1998).

on Commerce, 104th Cong., 1st Sess. 30 (1995) (statement of Edward E. Whitacre, Jr.). Thus, the BOCs plainly did not "waive" their bill of attainder rights; indeed, it is difficult to see what more they could have done to bring the problem to Congress's attention.

4. Finally, both the government and its private party supporters raise severability issues. Those issues can be fully aired when the case is briefed on the merits. A couple of points are worth noting, however. First, Congress was on notice that the BOCs believed the Special Provisions unconstitutional, and it passed section 601 anyway without any indication that the fate of the two were to be linked. Further, the law is settled that "[u]nless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law." *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684 (1987). Here, there can be no concern that the Special Provisions are "so intertwined" with the rest of the Act that "the Court would have to rewrite the law to allow it to stand." *Id.* The BOCs must comply with all generally applicable provisions of the Act—in particular, sections 251 and 252—with or without the Special Provisions. The elimination of those provisions would simply put them on an equal footing with all other similarly situated incumbent LECs, and not subject to specifically targeted penalties, which is, in the end, exactly what the Constitution requires.

CONCLUSION

The petition for a writ of certiorari should be granted.

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